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BILLION PRIMA SDN BHD & ANOR v. NUTECH COMPANY LTD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[SUIT NO: 22IP-50-09-2015]
B 23 SEPTEMBER 2016

CIVIL PROCEDURE: *Discovery – Application for – Discovery action against third parties – Conditions to be fulfilled – Rules of Court 2012, O. 24 rr. 7A & 8 – Whether affidavit specified documents sought with reasonable precision – Whether*
C *documents relevant to issues arising – Whether relevancy requirement satisfied – Whether application frivolous, vexatious or a fishing expedition – Whether documents sought were in possession, custody or power of third party – Whether disclosure of documents necessary to fairly dispose of action – Whether any privilege asserted in respect of documents – Whether court could invoke discretionary power*
D *to allow application*

CIVIL PROCEDURE: *Discovery – Relevancy of documents – Application for – Conditions to be fulfilled – Rules of Court 2012, O. 24 rr. 7A & 8 – Whether affidavit specified documents sought with reasonable precision – Whether documents relevant*
E *to issues arising – Whether relevancy requirement satisfied – Whether application frivolous, vexatious or a fishing expedition – Whether documents sought were in possession, custody or power of third party – Whether disclosure of documents necessary to fairly dispose of action – Whether any privilege asserted in respect of documents – Whether court could invoke discretionary power to allow application*

F The two defendants herein applied in court *via* encl. no 57 ('court encl. 57) under O. 24 r. 7A of the Rules of Court 2012 ('RC') for a discovery order against Iradar Sdn Bhd ('third party') which was not a party in the original action and counterclaim. The defendants applied for the orders, *inter alia,* that with respect to the BBScan Portal X-Ray Screening Machine ('BBScan System'), the third party should make an affidavit and serve on the
G defendants stating whether any of the documents or class of documents described in sch. A to court encl. 57 ('Schedule A documents') had been in the possession, custody or power of the third party. The defendants submitted that the third party had commenced a civil suit in the High Court against the defendants ('Suit 61') where the third party had admitted that the
H third party supplied and installed the radar component of the plaintiffs' BBScan System (Radar Component System). According to the defendants, since the third party was the manufacturer and supplier of the Radar Component System, it was inconceivable for the third party to claim that it did not have any Schedule A documents. The third party resisted court
I encl. 57 on the following grounds, *inter alia* (i) the affidavit by the defendants in support of court encl. 57 was "sketchy" and did not fulfil O. 24 r. 7A(3)(b) of the RC; (ii) Suit 61 was not related to this case; (iii) that court encl. 57

was a fishing expedition to "fish" some information to support the defendants in this case and learn the third party's intellectual property in its radar and (iv) court encl. 57 was an abuse of court process.

Held (allowing court encl. 57):

(1) From a reading of O. 24 rr. 7A and 8 of the RC, an applicant in a discovery application against a third party must fulfil six conditions before the court may exercise its discretion to order discovery against a third party: (i) the applicant's affidavit in support of the discovery application the against third party (supporting affidavit) shall "specify or describe the documents in respect of which the order is sought" (documents) as required by O. 24 r. 7A(3)(b) of the RC; (ii) the supporting affidavit shall "show, if practicable by reference to any pleading served" that the documents were "relevant to an issue arising or likely" to arise out of the claim made (relevancy requirement); (iii) the supporting affidavit shall show that the "person against whom the order is sought is likely to have or have had the documents in his possession, custody or power"; (iv) an applicant bears the legal onus to satisfy the court that a discovery application against third party is necessary to fairly dispose of the pending suit; (v) the documents are not privileged and the third party can be compelled by an order under O. 24 r. 7A(5) of the RC to produce the documents and (vi) the discovery application against third party and supporting affidavit shall be served personally on the third party. (para 10)

(2) The defendants' affidavit had described the Schedule A documents with reasonable precision. As such, the third party's contention that the defendants' affidavit was "sketchy" and did not comply with O. 24 r. 7A(3)(b) of the RC was rejected. Considering the pleadings one of the issues in this case was whether the plaintiffs' BBScan System had infringed the defendants' patent. In Suit 61, the third party had applied to invalidate the defendants' patent. The third party had admitted that the third party had manufactured, supplied and installed the Radar Component System in the plaintiffs' BBScan System. Clearly Schedule A documents were "relevant to an issue arising or likely" to arise out of this case. (para 12)

(3) The defendants had satisfied the relevancy requirement, thus court encl. 57 could not be frivolous, vexatious, speculative and/or a fishing expedition. Furthermore, the third party had previously filed Suit 61 against the defendants and would have been obliged in Suit 61 to disclose all documents regarding the Radar Component System to the defendants. The third party was "likely to have or have had" Schedule A documents in its possession, custody or power because the third party's affidavit had admitted the manufacture, supply and installation

of the Radar Component System in the plaintiffs' BBScan System. Thus, the third party's disclosure of Schedule A documents was necessary to fairly dispose of this action and to save costs in this case. (para 12)

(4) The third party's affidavit did not assert any privilege in respect of Schedule A documents which would defeat court encl. 57 according to O. 24 r. 7A(7)(b) of the RC. The third party's averment that information regarding the Radar Component System was the third party's intellectual property which was confidential, could not be a reason to refuse discovery. Pursuant to O. 24 r. 7A(5) and (6)(a) of the RC, the court may impose a condition in the discovery order that the defendants could not use the information contained in Schedule A documents for any purpose other than for this case. It was also not disputed that court encl. 57 and the defendants' affidavit had been served on the third party and all the other parties in this action. (para 12)

(5) The defendants had fulfilled the six conditions required before the court may exercise its discretion to order discovery against a third party. No reason had been advanced in the third party's affidavit to persuade this court not to invoke its discretionary power to allow court encl. 57. Hence, court encl. 57 was allowed with costs on an indemnity basis to be paid by the defendants to the third party for court encl. 57 and for the third party's compliance with this discovery order. (paras 13-17)

Case(s) referred to:

Ahmad Zahri Mirza v. Pricewaterhousecoopers Capital Sdn Bhd & Ors [2015] 7 CLJ 930 HC ***(refd)***

Kuah Kok Kim & Ors v. Ernst & Young (a firm) [1997] 1 SLR 169 ***(refd)***

O'Sullivan v. Herdmans Ltd [1987] 1 WLR 1047 ***(refd)***

Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [2008] 5 CLJ 42 CA ***(refd)***

Ong Commodities Pte Ltd v. Kek Tek Huat Sdn Bhd & Anor [2015] 10 CLJ 585 HC ***(refd)***

Thyssen Hunnebeck Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd [2003] 1 SLR 75 ***(refd)***

VisionHealthOne Corp Pte Ltd v. HD Holdings Pte Ltd & Ors (Chan Wai Chuen & Anor, Third Parties) [2010] 3 SLR 97 ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 24 rr. 3(1), (4), 7A(2), (3)(b), (4), (5), (6)(a), (7)(b), (9), 8, O. 38 r. 16(1)

Rules of the High Court 1980, O. 24 r. 3(1)

Administration of Justice Act 1970 [UK], s. 32(1)

Rules of Court [Sing], O. 24 rr. 6, 7

For the 3rd party - Gan Techiong; M/s Gan & Lim

For the defendants - Khoo Guan Huat, Kuek Pei Yee & Joshua Teoh Beni Chris; M/s Skrine

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] In this case, the two defendants in the original action (defendants) have applied in court encl. no. 57 (court encl. no. 57) under O. 24 r. 7A of the Rules of Court 2012 (RC) for a discovery order against iRadar Sdn Bhd (third party) which is not a party in the original action and counterclaim. I am not able to find a previous Malaysian case on the application of O. 24 r. 7A of the RC against a third party in a pending suit.

Court Encl No. 57

[2] In court encl no. 57, the defendants applied for the following orders, among others:

(1) with respect to the "BBScan Portal X-Ray Screening Machine" (BBScan System), the third party shall within seven days from the date of an order of this court, make an affidavit and serve on the defendants' solicitors stating the following:

  (a) whether any of the documents or class of documents described in schedule A to court encl no. 57 (Schedule A documents) are or had been in the possession, custody or power of the third party and if so, the details of such documents; and

  (b) in the event any of Schedule A documents are not in the possession, custody or power of the third party, the third party shall specify:

    (i) when the third party has parted with Schedule A documents; and

    (ii) who are the person or party currently having possession, custody or power of Schedule A documents;

(2) within seven days from the date of an order of this court, the third party shall produce and give copies of Schedule A documents for the inspection and custody of the defendants and/or their solicitors (prayer 2);

(3) consequent upon an order in terms of prayer 2, the defendants and/or their solicitors shall have liberty to peruse and make copies of Schedule A documents; and

(4) costs of court encl. no. 57 shall be paid by:

  (a) the plaintiffs in the original action (plaintiffs); and/or

  (b) the third and fourth defendants in the counterclaim (third and fourth defendants (counterclaim)]

- to the defendants.

Defendants' Submission

[3] The third party had commenced Kuala Lumpur High Court Civil Suit No. 22IP-61-11-2015 against the defendants (suit no. 61). In suit no. 61, the third party had admitted that the third party had supplied and installed the radar component of the plaintiffs' BBScan System (Radar Component System). As such, the defendants are seeking in court encl. no. 57 for Schedule A documents regarding the Radar Component System.

[4] According to the defendants, since the third party is the manufacturer and supplier of the Radar Component System, it would be "inconceivable" for the third party to claim that the third party did not have any of Schedule A documents. The defendants had relied on Edgar Joseph Jr J's (as he then was) judgment in the High Court case of *Yekambaran Marimuthu v. Melayawata Steel Berhad* [1994] 2 CLJ 581.

Third Party's Contentions

[5] The third party had resisted court encl no. 57 on the following grounds, among others:

(1) the affidavit of Mr Liu Xilong affirmed on 9 June 2016 (defendants' affidavit) in support of court encl. no. 57 was "sketchy" and did not fulfil O. 24 r. 7A(3)(b) of the RC;

(2) Suit No. 61 is not related to this case as:

(a) the Radar Component System is a "stand-alone" product;

(b) the third party was only involved in the supply of an accurate and "robust" Radar Component System. The third party was "never involved in any aspect of designing and production" of the plaintiffs' BBScan System; and

(c) Billion Prima Sdn Bhd, the first plaintiff company in the original action (first plaintiff), would not disclose to the third party any more information than was necessary for the third party to supply the Radar Component System;

(3) it is "normal practice" for a supplier of high technology product such as the Radar Component System, not to disclose any information which would enable any reproduction of the product by way "reverse engineering". As such, the third party did not disclose its intellectual property in the Radar Component System to the first plaintiff. This is to avoid enabling the first plaintiff from producing the first plaintiff's own radar in the future;

(4) in respect of Schedule A documents:

(a) the information sought in item no. 1 had been made available in the defendants' affidavit;

(b) the third party has no knowledge of the information sought in items no. 2, 3(1), 3(2) and 6;

(c) the information sought in item no. 4:

(i) is the third party's intellectual property and is confidential; and

(ii) is not relevant to the claims in the defendants' Patent No. MY-142862-A (defendants' patent no. 862); and

(d) the information sought in item no. 5 is not relevant to the third party because the third party does not supply any "optical character recognition" component to the first plaintiff;

(5) Court encl. no. 57 is a fishing expedition to:

(a) "fish" some information to support the defendants in this case; and

(b) learn the third party's intellectual property in its radar.

Reliance had been placed by the third party on Lee Swee Seng JC's (as he then was) decision in the High Court case of *Ahmad Zahri Mirza v. Pricewaterhousecoopers Capital Sdn Bhd & Ors* [2015] 7 CLJ 930;

(6) the defendants' patent no. 862 did not mention radar. There is therefore, no justification for the third party to disclose its intellectual property related to its radar. The third party cited O. 24 r. 8 of the RC in support of this submission; and

(7) based on the above contentions, court encl. no. 57 is an abuse of court process. By reason of O. 24 r. 7A(9) of the RC, the defendants should pay costs of court encl. no. 57 to the third party on an indemnity basis.

Whether Court Should Allow Court Encl No. 57

[6] Order 24 rr. 7A and 8 of the RC provide as follows:

Discovery against other person

Order 24 r 7A

(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

(2) *An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.*

(3) An originating summons under paragraph (1) or **a notice of application under paragraph (2) shall be supported by an affidavit which shall**:

A (a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and

B (b) *in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings*, or both, **and that the person against whom the order is sought is likely to**
C **have or have had them in his possession, custody or power**.

(4) **A copy of the supporting affidavit shall be served with** the originating summons or **the notice of application on every person** on whom the originating summons or **the notice of application is required to be served**.

(5) **An order for the discovery of documents** before the commencement
D of proceedings or **for the discovery of documents by a person who is not a party to the proceedings may be made by the Court** for the purpose of or with a view to identifying possible parties to any proceedings **in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just**.

E (6) **An order for the discovery of documents may**:

(a) be made conditional on the applicant giving security for the costs of the person against whom it is made or **on such other terms, if any, as the Court thinks just**; and

(b) *require the person against whom the order is made to make an affidavit stating*
F *whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them*.

(7) **A person shall not be compelled by such an order to produce any**
G **document which he could not be compelled to produce**:

(a) in the case of an originating summons under paragraph (1), if the subsequent proceedings had already been commenced; or

(b) **in the case of a notice of application under paragraph (2), if he had been served with a subpoena to produce documents at the trial**.

H (8) For the purposes of rules 10 and 11, an application for an order under this rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

(9) *Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be*
I *entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis*.

Discovery to be ordered only if necessary

Order 24 rule 8 *On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.*

(emphasis added).

[7] Firstly, O. 24 r. 7A of the RC may apply in the following two circumstances:

(1) before the institution of any action, a party may apply for discovery of documents from any party by way of an originating summons "for the purpose of or with a view to identifying possible parties to any proceedings" (pre-action discovery application to identify party to be sued). The following two High Court decisions concerned pre-action discovery applications to identify party to be sued:

(a) *Ahmad Zahri Mirza*; and

(b) Vazeer Alam Mydin J's judgment in *Ong Commodities Pte Ltd v. Kek Tek Huat Sdn Bhd & Anor* [2015] 10 CLJ 585; [2016] 10 MLJ 344; and

(2) in a pending action, a party may apply for discovery of documents from any third party for documents which are "relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings" (discovery application against third party). Court encl. no. 57 is a discovery application against third party.

[8] Our O. 24 rr. 7A and 8 of the RC are substantially similar (not identical) to O. 24 rr. 6 and 7 of Singapore's Rules of Court (RC (Singapore)). As such, Singapore cases may be referred in the construction of our O. 24 rr. 7A and 8 of the RC – please see *Ahmad Zahri Mirza*, at paras. 17-19, 38 and 39.

[9] Firstly, I am of the view that a pre-action discovery application to identify party to be sued should be distinguished from a discovery application against third party. My view is premised on the following reasons:

(1) in a pre-action discovery application to identify party to be sued, the plaintiff has not filed any suit. A pre-action discovery application to identify party to be sued is to assist a potential plaintiff who "does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer", but, significantly, this tool is also qualified with "safeguards specified in the rules ... to ensure that the plaintiff is not allowed to take advantage of the rules

merely to enable him to go on a fishing expedition" – please see Lai Kew Chai J's judgment in the Singapore Court of Appeal case of *Kuah Kok Kim & Ors v. Ernst & Young (a firm)* [1997] 1 SLR 169, at para. 31; and

(2) Section 32 of the then United Kingdom's Administration of Justice Act 1970 (AJA (UK)) confers power on the High Court to, among others, order a third party to disclose documents in proceedings regarding personal injuries to a person or a person's death. The relevant part of s. 32 AJA (UK) is reproduced as follows:

> 32. Extension of existing powers of court to order disclosure of documents, inspection of property, etc.
>
> (1) *On the application, in accordance with rules of court, of a party to any proceedings in which a claim in respect of personal injuries to a person or in respect of a persons' death is made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising out of that claim:*
>
> (a) *to disclose whether those documents are in his possession, custody or power; and*
>
> (b) *to produce to the applicant such of those documents as are in his possession, custody or power.*
>
> (2) On the application, in accordance with rules of court, of a party to any such proceedings are referred to in subsection (1) above, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say:
>
> (a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, any party to the proceedings but which is the subject matter of the proceedings or as to which any question arises in the proceedings;
>
> (b) the taking of samples of any such property as is mentioned in paragraph (a) above and the carrying out of any experiment on or with any such property.
>
> (emphasis added).

In *O'Sullivan v. Herdmans Ltd* [1987] 1 WLR 1047, at 1055-1056, a case concerning discovery application against third party under s. 32(1) of the AJA (UK), Lord MacKay held as follows:

> In terms of section 32(1), when an application has been made in accordance with the rules in proceedings of the kind described and in the circumstances specified in the rules, all of which prerequisites have admittedly been met in the present case, the court has a power in no way expressly fettered to order production of any documents which are

relevant to an issue arising out of the claim as these documents admittedly are. *Where such an unfettered power is given, in my opinion, it is to be construed as a power to be exercised when its exercise would help to achieve the purpose of the Act which is the proper administration of justice or, to put the matter negatively, in the words of Lord Diplock in McIvor v. Southern Health and Social Services Board [1978] N.I. 1, 10; [1978] 1 W.L.R. 757, 760, the court can decline to make an order*

> **if it is of opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way.**

In my opinion, there is no factor present in the circumstances of this case which would indicate that it would be just to refuse to exercise the power and *there are strong factors in favour of the exercise of the power. If the case goes to trial it is obviously in the interests of justice that these documents of central importance should be available to both parties before the trial starts so that the jury may be given a fair impression of the central issues from the beginning. To force the defendants to refuse to deploy their full position in cross-examination until the stage is reached at which these documents would be available to them under a subpoena duces tecum would not be in any way in the interests of justice. Further the early production of these documents may well affect the course of the litigation before the trial. It may lead the defendants to consider a settlement of the action and it certainly will enable the medical advisers and the legal advisers of the defendants to appreciate the real issues in the case when they are preparing for trial. The interests of justice are, in my opinion, served by the promotion of settlements rather than the prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has actually started.*

(emphasis added).

O'Sullivan has been followed by Chan Seng Onn J in the Singapore High Court case of *VisionHealthOne Corp Pte Ltd v. HD Holdings Pte Ltd & Ors (Chan Wai Chuen & Anor, Third Parties)* [2010] 3 SLR 97, at para. 39, a case regarding discovery application against third party; and

(3) I am of the view that *O'Sullivan* and *Vision Health One Corp Pte Ltd* should apply to discovery applications against third party under our O. 24 rr. 7A and 8 of the RC. The conditions for the court to exercise its discretionary power to decide a discovery application against third party under our O. 24 rr. 7A and 8 of the RC, should be construed in a purposive manner so as to achieve justice. This purposive interpretation is supported by the following pragmatic reasons:

(a) an early production of documents by way of a discovery application against third party, may assist parties and their solicitors to consider a possible settlement of the dispute at hand;

(b) documents disclosed by a third party shall be made available to all parties before the commencement of trial. In such a manner, parties' preparation for trial is facilitated and the trial may then be disposed of expeditiously;

(c) if a party can obtain documents from a third party before the commencement of trial under O. 24 r. 7A of the RC, the party need not expend time, costs and effort to apply for and to serve a subpoena under O. 38 r. 16(1) of the RC for the third party to produce documents at the trial of the case (subpoena to produce documents);

(d) if a party applies for a subpoena to produce documents against a witness, the following problems may arise to delay the disposal of a trial:

(i) the witness may apply to court to set aside the subpoena to produce documents and upon the court's refusal of such an application (court's refusal to set aside subpoena to produce documents), the witness may apply to stay the trial pending the disposal of the witness' appeal against the court's refusal to set aside subpoena to produce documents; and

(ii) there may be problems in the service of the subpoena to produce documents which necessitates a postponement of the trial; and

(e) the trial may be unnecessarily prolonged by witnesses merely producing documents (after due service of subpoenas to produce documents) when a discovery application against third party can and should be easily made before the commencement of trial.

[10] My understanding of O. 24 rr. 7A and 8 of the RC is that an applicant in a discovery application against third party (applicant), must fulfil the following six conditions before the court may exercise its discretion to order discovery against a third party (six conditions):

(1) the applicant's affidavit in support of the discovery application against third party (supporting affidavit) shall "specify or describe the documents in respect of which the order is sought" (documents) as required by O. 24 r. 7A(3)(b) of the RC. In this regard, I refer to the Singapore Court of Appeal's judgment in *Kuah Kok Kim*, at para. 37, as follows:

> 37 *As long as the appellants described the type or class of documents with reasonable precision, and that class of documents were relevant to the cause or intended cause of action, that would be enough. They need not go on to describe and name each and every such document specifically. Indeed, it would be unreasonable and impossible for the appellants to do so.*
>
> (emphasis added).

Based on *Kuah Kok Kim*, the supporting affidavit need only describe the documents with reasonable precision. If the documents have been described with reasonable precision, the discovery application against third party cannot be said to constitute a fishing expedition - please see

the Court of Appeal's judgment delivered by Abdul Malik Ishak JCA in *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42; [2008] 3 MLJ 625, at para. 21 (a case regarding a discovery application by defendants in a pending suit against the plaintiff);

(2) the supporting affidavit shall "show, if practicable by reference to any pleading served" that the documents are "relevant to an issue arising or likely to arise out of the claim made" (relevancy requirement). Regarding the relevancy requirement:

(a) the relevancy requirement is not as stringent as that provided by O. 24 r. 3(4) of the RC concerning a discovery application by one party against another party in a pending action. Order 24 r. 3(4) of the RC provides as follows:

> *3(4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:*
>
> *(a) the documents on which the party relies or will rely; and*
>
> *(b) the documents which could:*
>
> *(i) adversely affect his own case;*
>
> *(ii) adversely affect another party's case; or*
>
> *(iii) support another party's case.*
>
> (emphasis added).

The lower threshold of the relevancy requirement is understandable in view of the purposive interpretation of O. 24 r. 7A of the RC as explained in the above sub-paras. 9(2) and (3);

(b) Order 24 r. 3(1) of the previous Rules of the High Court 1980 (RHC) provides that in pending actions, the court may order the discovery of documents "relating to any matter in question in the cause or matter". Once again, I am of the view that the relevancy requirement is less stringent than that provided in O. 24 r. 3(1) of the RHC because O. 24 r. 7A of the RC permits discovery of documents relevant to an issue which is "likely to arise out of the claim made or likely to be made in the proceedings". In other words, the relevancy requirement is satisfied when the supporting affidavit shows that the documents are relevant to any issue which may be "likely" to arise in the pending suit. Such a view is fortified by a purposive construction of O. 24 r. 7A of the RC (please see the above sub-paras. 9(2) and (3)); and

(c) an applicant has the legal burden to fulfil the relevancy requirement. Once the relevancy requirement is satisfied, I do not think the discovery application against third party is frivolous, vexatious, speculative or a fishing expedition. I refer to Choo Han Teck JC's

(as he then was) judgment in the High Court case of *Thyssen Hunnebeck Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75, at paras. 5 and 6, as follows:

> 5. … *I accept that in some cases the line between a reasonable possibility of finding such information and a fishing expedition is a fine one. Hence, a case must be considered on its own merits. It will be borne in mind that should it subsequently transpire that no relevant information was in fact found in the documents disclosed, that does not, in itself, mean that the request was a fishing expedition - a term that used to serve well, but has recently been showing signs of abuse. It must be remembered that the right and entitlement of the party concerned is to know and inspect the documents in the hands of the other. The relevancy of the connection of the documents to the claim is a broader form of relevancy than the relevancy of documents for the purposes of admitting them into evidence at trial*. If that is thought to be a "fishing expedition", then it is time to examine more closely what that term means.
>
> 6 *In my view, I would hold that a "fishing expedition" in the context of discovery refers to the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a "fishing expedition". But I would myself prefer to approach such applications strictly on the basis of the broader relevancy test. That has the advantage of training one's focus directly on the matter at hand, and avoiding the distractions inherent in analogies - even one that has become a term of art, the "fishing expedition", for example*. …
>
> (emphasis added).

Thyssen Hunnebeck Singapore Pte Ltd concerns a discovery application between parties in a pending action but I am of the view that the above judgment applies to our O. 24 r. 7A of the RC;

(3) the supporting affidavit shall show that the "person against whom the order is sought is likely to have or have had (the documents) in his possession, custody or power". This requirement under O. 24 r. 7A(3)(b) of the RC is different from O. 24 r. 3(1) of the RC and O. 24 r. 3(1) of the RHC which provide for discovery of documents "which are or have been in his possession, custody or power". Such a wide application of O. 24 r. 7A(3)(b) of the RC to include third parties who are "likely" to have or have had the documents in their possession, custody or power, may be justified on a purposive interpretation of O. 24 r. 7A of the RC (please see the above sub-paras. 9(2) and (3));

(4) as required under O. 24 r. 8 of the RC, an applicant bears the legal onus to satisfy the court that a discovery application against third party is necessary, either:

(a) to fairly dispose of the pending suit; or

(b) to save costs.

It suffices if either one of the two matters stated in O. 24 r. 8 of the RC is satisfied by an applicant. In other words, if an applicant can persuade the court that a discovery application against third party is necessary to fairly dispose of the pending action, the court should be inclined to exercise its discretion to order discovery against a third party even though such an order may not save costs;

(5) the documents are not privileged and the third party can be compelled by an order under O. 24 r. 7A(5) RC of the to produce the documents. Order 24 r. 7A(7)(b) of the RC allows a third party to claim privilege as a valid ground for not disclosing the documents – please see *Ong Boon Hua*, at para. 38; and

(6) according to O. 24 rr. 7A(2) and (4) of the RC, the discovery application against third party and supporting affidavit shall be served:

(a) personally on the third party; and

(b) on every party in the pending suit.

[11] Even if the six conditions are satisfied by an applicant, the court nevertheless retains a discretion under O. 24 r. 7A(5) of the RC (by reason of the use of the word "may" in O. 24 r. 7A(5) of the RC) to dismiss the discovery application against third party or grant a discovery order against a third party:

(1) without any condition; or

(2) with a condition as the court thinks just under O. 24 r. 7A(5) and/or (6)(a) of the RC (by the use of the phrase "on such terms, if any, as the court thinks just").

[12] I am satisfied that the six conditions have been fulfilled by the defendants in court encl. no. 57. This decision is premised on the following evidence and reasons:

(1) the defendants' affidavit had described the Schedule A documents with reasonable precision. As such, I reject the third party's contention that the defendants' affidavit was "sketchy" and did not comply with O. 24 r. 7A(3)(b) of the RC;

(2) considering the pleadings filed in this case (pleadings), namely:

(a) the plaintiffs' amended statement of claim;

(b) the defendants' amended defence and counterclaim;

(c) the plaintiffs' reply and defence to amended counterclaim; and

(d) the defence of the third and fourth defendants (counterclaim)

I am satisfied that one of the issues in this case is whether the plaintiffs' BBScan System had infringed the defendants' patent no. 862. In Suit No. 61, the third party had applied to invalidate the defendants' patent no. 862. In paras. 3 to 6 of the third party's affidavit affirmed by Dr Koo Voon Chet on 20 June 2016 (third party's affidavit) filed to oppose court encl. no. 57, the third party had admitted that the third party had manufactured, supplied and installed the Radar Component System in the plaintiffs' BBScan System. Clearly, Schedule A documents are "relevant to an issue arising or likely" to arise out of this case.

As the defendants have satisfied the relevancy requirement, court encl. no. 57 cannot be frivolous, vexatious, speculative and/or a fishing expedition. Furthermore, the third party had previously filed suit no. 61 against the defendants and would have been obliged in suit no. 61 to disclose all documents regarding the Radar Component System to the defendants;

(3) sub-paragraphs 11(ii), (iii) and (vi) of the third party's affidavit averred that the third party had no knowledge of items no. 2, 3(1), 3(2) and 6 of Schedule A documents. The third party's affidavit did not state that the third party had no Schedule A documents in its possession, custody or power.

I find that the third party is "likely to have or have had" Schedule A documents in its possession, custody or power because the third party's affidavit had admitted the manufacture, supply and installation of the Radar Component System in the plaintiffs' BBScan System;

(4) I am satisfied that the third party's disclosure of Schedule A documents is necessary:

(a) to fairly dispose of this action; and/or

(b) to save costs in this case;

(5) the third party's affidavit did not assert any privilege in respect of Schedule A documents which will defeat court encl. no. 57 according to O. 24 r. 7A(7)(b) of the RC. The third party's averment that information regarding the Radar Component System is the third party's intellectual property which is confidential, cannot be a reason to refuse discovery. If the third party's information concerning the Radar Component System is confidential, pursuant to O. 24 r. 7A(5) and (6)(a) of the RC, the court may impose a condition in the discovery order that the defendants cannot use the information contained in Schedule A documents for any purpose other than for this case; and

(6) it is not disputed that court encl. no. 57 and the defendants' affidavit had been served on the third party and all the other parties in this action.

[13] As the defendants have fulfilled the six conditions, the next question is whether there is any reason for this court to decline to exercise its discretion to order discovery against the third party. No reason has been advanced in the third party's affidavit to persuade this court not to invoke its discretionary power to allow court encl. no. 57. Nor has the third party's written submission persuaded me to exercise my discretion to refuse court encl. no. 57.

Costs

[14] Order 24 r. 7A(9) of the RC provides that if the court does not order otherwise, the third party should be entitled to costs on an indemnity basis for:

(a) Court encl. no. 57; and

(b) the third party's compliance with a discovery order.

[15] Firstly, I have to decline the defendants' application for costs of court encl. no. 57 to be borne by the plaintiffs, third and fourth defendants (counterclaim). This is because, court encl. no. 57 does not concern the plaintiffs, third and fourth defendants (counterclaim) – please see *VisionHealthOne Corp Pte Ltd.*

[16] I do not find any reason in court encl. no. 57 which will justify a refusal of an order for costs on an indemnity basis in the third party's favour. As such, I award the third party costs on an indemnity basis for court encl. no. 57 and for the third party's compliance with this discovery order.

Court's Decision

[17] Premised on the above reasons and evidence, court encl. no. 57 is allowed with costs on an indemnity basis to be paid by the defendants to the third party for court encl. no. 57 and for the third party's compliance with this discovery order.